APPENDIX A

[LETTERHEAD OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT]

Filed: September 24, 1998

Daniel Leon Carison
10408 Barricks Road
Louisville, KY 40229

John L. Caudill
Office of the U.S. Attorney
510 W. Broadway
Tenth Floor Bank of Louisville Building
Louisville, KY 40202

RE: 98-6060
Carlson vs. USA
District Court No. 97-00205

Enclosed is a copy of an order which was entered today in the above-styled case.

Julie Brock
Case Manager

Enclosure

Certified Copy:
Honorable John G. Heyburn II
Mr. Jeffrey A. Apperson

No. 98-6060

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DANIEL LEON CARLSON, - - - *Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, - *Respondent-Appellee.*

ORDER — Filed September 24, 1998

Before: MARTIN, Chief Judge.

Daniel Leon Carlson appeals a district court decision denying his motion to vacate sentence filed under 28 U.S.C. § 2255. Carlson has requested a certificate of appealability from this court.

Upon review, the application for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Clerk

APPENDIX B

Case No. 3:97CV-P205-H; 3:96CR-1-H

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES DISTRICT COURT

DANIEL LEON CARLSON - - - *Movant/Defendant*

v.

UNITED STATES OF AMERICA - *Respondent/Plaintiff*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION —
Entered March 26, 1998

FINDINGS OF FACT

1) Daniel Leon Carlson is a former federal prisoner.[1] On July 26, 1996, Carison was sentenced to a total term of imprisonment of 24 months. The sentence followed Carison's guilty plea to charges of possession of 86 stolen firearms shipped in interstate commerce, knowing possession of a firearm with an obliterated serial number, and knowingly failing, as a licensed gun dealer, to properly register the same 86 firearms.

2) Carlson has filed a motion pursuant to 28 U.S.C. § 2255 to vacate his sentence of conviction. As grounds for such relief, Carlson argues that his trial counsel, Scott

[1]Carlson was incarcerated at the Federal Correctional Institute in Lexington, Kentucky. He apparently was released from that institution on December 30, 1997, to a new address at 10408 Barricks Road in Louisville, Kentucky. The record does not indicate whether this address is a halfway house, or a private home.

Cox, rendered ineffective assistance. Specifically, Carlson argues that he was pressured by Cox to plead guilty, when Cox should have known that Carlson could not be convicted under either 18 U.S.C. § 922(k) or 18 U.S.C. § 923(g). Carison insists that Cox should have been aware, prior to advising him to plead guilty, that "none of the charges filed have implementing authority as required by the Federal Register Act," and that the jurisdiction and venue for the charges was improper (3:97CV-P205-H, Docket No. 3, p.2). Further, Carlson insists that he could not have been convicted of the charges as there was no evidence that he knew the firearms were stolen at the time of their purchase, or that he knew the one gun had its serial number obliterated. Finally, Carison maintains that his sentencing level was improperly increased by the District Court when it refused to treat the weapons involved as being a "collection" under United States Sentencing Guideline 2K2. 1(b)(1)(F).

3) The United States has filed a response to Carlson's motion (Docket No. 39). The government responds that the criminal statutes involved do not fall within the Federal Register Act, that ample evidence existed to show that Carlson knew the guns were stolen, and that the one weapon had its serial number removed. Finally, the United States maintains that Carlson's attorney, Scott Cox, timely raised the question of whether the guns seized should be considered a collection under the Sentencing Guidelines.

4) Carlson has filed a reply to the government's response (Docket No.41). He has also filed a separate motion for summary judgment (Docket No. 40). The District Court has referred this matter to the Magistrate Judge pursuant to 28 U.S.C. § 636)(b)(1)(B).

CONCLUSIONS OF LAW

The Magistrate Judge, having made findings of fact, makes the following conclusions of law.

1) Carlson has raised a claim of ineffective assistance of counsel as the basis for his § 2255 motion to vacate. The

standard for determining ineffective assistance of counsel is well established. Carlson must prove two things. First, that the performance of Cox was deficient, or in other words, unreasonable under the circumstances; and second, that as a result of the deficient performance, he was so prejudiced that the result of the proceedings were unfair and unreliable. *Strickland* v. *Washington,* 466 U.S. 668, 687 (1984); *Sims* v. *Livesay,* 970 F.2d 1575, 1579-81(6th Cir. 1992). Carlson must meet both prongs of this test if he is to obtain relief. *Id.* Further, the federal courts take a highly deferential view of an attorney's performance. *Strickland,* 466 U.S. at 689. A defense attorney will be presumed to have rendered adequate assistance, and all of his or her decisions to have been a reasonable exercise of professional judgment, absent proof to the contrary. *O'Hara* v. *Wigginton,* 24 F.3d 823, 828 (6th Cir. 1994). Carlson must overcome this presumption if he is to prevail. *Id.*

2) Carison has not met his burden. In fact, his arguments are frivolous. They merit little discussion.

3) The trial court obviously had jurisdiction and venue to hear Carlson's prosecution. Carlson's only argument on this point rests entirely on the Federal Register Act and the parallel table of authorities. The Federal Register Act, however, is inapplicable in the context of a criminal prosecution. The Act was passed in the 1930's to address the haphazard manner in which administrative agencies were publishing and distributing their rules and regulations. *Kernnecott Utah Copper* v. *U.S Dept. of Interior,* 88 F.3d 1191, 1204-05 (D.C. Cir. 1996) (H.R. Rep. No. 280, 74th Cong., 1st Sess. 2 (1935)). At most, "[t]he Federal Register Act establishes a process for maintaining the government's rules and regulations and for publishing them in the Federal Register." *Id.* at 1205. Further, the Act is written to apply to the term, "document," which is defined to mean: "A Presidential proclamation or Executive order and an order, regulation, rule, certificate, code of fair competition, license, notice or similar instrument, issued, prescribed, or promulgated by a Federal agency." 44 U.S.C. § 1501. The

term "Federal agency" is specifically defined to exclude "the legislative or judicial branches of the Government." Thus, a general criminal statute passed by Congress such as 18 U.S.C. § 922 or § 923 falls outside the definitions of both document and Federal agency. Only administrative regulations which criminalize an act are required to be published in the Federal Register, not the general criminal statutes. See *Hotch* v. *United States,* 212 F.2d 280 (9th Cir. 1954).

4) Cox clearly was not deficient in failing to raise this frivolous argument as a defense to Carlson's prosecution. Cox also was not unreasonable in urging Carlson to enter a guilty plea to the charges. The proof against Carlson was overwhelming by anyone's standard. ATF agents executed a search warrant at Carlson's home in May of 1994. Carlson waived his rights and agreed to be interviewed by the agents. During the interview, Carlson admitted that he was suspicious that the weapons he obtained from Randy Fitz and Eddie Bishop, two burglars involved in numerous burglaries in Indiana and Kentucky, were stolen due to the number of weapons and the reduced price of the weapons he purchased from the two men.

5) ATF agents recovered 155 firearms from Carlson's property that day. Of these firearms, 38 were then known to be stolen. It was later determined that 86 of the firearms were in fact stolen. Carlson acknowledged during the entry of his guilty plea that he had reasonable cause to believe these firearms were previously stolen, and that he did not maintain the required records on the firearms (Docket No.33, pp. 9-10). Accordingly, the proof against Carlson was overwhelming with much of it being provided by Carlson himself.

6) It is difficult to imagine how Cox failed Carlson in any fashion by advising him to plead guilty. The federal statute relating to possession of a stolen firearm shipped in interstate commerce, 18 U.S.C. § 922, expressly provides that the firearm may have been stolen "either before or after" it traveled in interstate commerce. *United States*

v. *Honaker,* 5 F.3d 160, 162 (6th Cir. 1993), cert. denied, 114 S.Ct. 1071 (1991). Thus, the United States did not have to prove that the firearms were stolen prior to their movement in interstate commerce in order to convict Carlson had he gone to trial. Further, the majority view among the federal circuits at the time of Carlson's plea was that the government need not prove a defendant was aware of an obliterated serial number in order to establish a conviction under 18 U.S.C.§ 922(k). *See United States* v. *Dorsey,* 591 F.2d 922, 936 n.19 (D.C. Cir. 1978). Even assuming the existence of such an element, Carlson, by his voluntary and intelligent guilty plea, waived any opportunity to challenge the sufficiency of the evidence. *See gen. Tollett* v. *Henderson,* 411 U.S. 258 (1973) (valid guilty plea cuts off all defenses that do not run to the validity of the guilty plea).

7) Finally, Cox was not deficient in the manner in which he handled the question of whether Carison's guns logically could be characterized as a "collection" for the purpose of the Sentencing Guidelines. Cox raised this issue repeatedly and filed a detailed memorandum setting forth Carison's position that he was entitled to a six level decrease because the numerous firearms seized were merely a gun collection. The District Court rejected this argument in a welldrafted and thoughtful opinion. Cox cannot be faulted for his efforts in this case.

8) In fact, he obtained a highly favorable result for Carlson. The government agreed to recommend a sentence in the low end of the applicable guideline range. Further, the District Court could have lawfully departed upward from the guideline range, since Carlson possessed in excess of 50 stolen firearms, some with obliterated serial numbers. In fact, Cox was even successful in having the District Court recommend that Carlson be incarcerated at the Federal Correctional Institute in Lexington, Kentucky, due to his health problems. The record entirely refutes Carlson's claims of ineffective assistance of counsel to such a degree that his arguments must be considered to be frivolous.

RECOMMENDATION

The Magistrate Judge, having made findings of fact and conclusions of law, recommends that the motion to vacate be dismissed with prejudice, and that Carlson be denied a certificate of probable cause to appeal, since an appeal would not be in good faith given the frivolous nature of the motion.

Date: 3-25-98

/s/ C. Gambill
C. Cleveland Gambill
United States Magistrate Judge

Entered: March 26, 1998

Copies to:
Movant, Pro Se
United States Attorney

NOTICE

Within ten (10) days after being served a copy of these proposed Findings and Recommendation, any party who wishes to object must file and serve written objections or further appeal is waived. *Thomas* v. *Arn*, 728 F.2d 813 (6th Cir. 1984), *aff'd.*, 474 U.S. 140 (1985). 28 U.S.C. § 636(b)(1)(C); Fed.R.Civ.P. 72(b).

APPENDIX C

[LETTERHEAD OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT]

Filed: December 9, 1998

Daniel Leon Carison
10408 Barricks Road
Louisville, KY 40229

RE: 98-6060

Carlson vs. USA

District Court No. 97-00205

Dear Daniel Leon Carlson:

Enclosed is a copy of an order which was entered today in the above-styled case.

Very truly yours,
Leonard Green, Clerk
/s/ [illegible]
Beverly L. Harris
Deputy Clerk

Enclosure

cc: Mr. John L. Caudill

No. 98-6060

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DANIEL LEON CARLSON, - - - *Petitioner-Appellant,*

v.

UNITED STATES OF AMERICA, - *Respondent-Appellee.*

ORDER — Filed December 9, 1998

Before: NELSON, SILER, and DAUGHTREY, Circuit Judges.

Daniel Leon Carlson petitioned this court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to a panel of three judges on which the original deciding judge does not sit, as well as to all other active judges of the court. No judge having requested a vote on the suggestion for en banc rehearing, the petition was referred to the panel of three judges for a determination on the merits the petition for rehearing.

The panel has further reviewed the petition for rehearing and concludes that the application for a certificate of appealability was properly denied. Accordingly, the application for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Clerk

APPENDIX D

Criminal No. 3:96-CR-1-H

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

DANIEL LEON CARLSON, - - - - - - *Movant,*

v.

UNITED STATES OF AMERICA, - - - *Respondent.*

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28 USC § 2255
MOTION TO VACATE, CORRECT AND SET ASIDE SENTENCE BY MOVANT IN FEDERAL CUSTODY
— Filed April 15, 1997

COMES NOW, Daniel Leon Carison, Movant, pro se and with the assistance of "jailhouse counselors," and moves this Honorable Court to vacate, correct and set aside Movant's conviction and sentence imposed by this Court pursuant to an erroneous guilty plea by Movant before this Court on March 27, 1996.

In addition to the above erroneous guilty plea, Movant also alleges ineffective assistance of counsel as a violation of the Sixth Amendment to the Constitution. The particulars of this ineffective assistance of counsel are numerous, however, your Movant will only list a small number. First and foremost is the fact that Movant' s attorney, Mr. Cox, allowed and even coerced Movant into an uninformed guilty plea to charges that he either knew, should have known, or through proper due diligent research would have found out that the charges against Movant could not possibly hold to the close scrutiny of a trial. By not properly researching the statutes, Mr. Cox made a tragic error at the sentencing hearing of June 25, 1996. Looking to the tran-

scripts of this hearing, on page 12, line #1, Mr. Cox states: "There is no question about his guilt." Had Mr. Cox accomplished the required research, he would have found that the proper way to represent Movant was at trial, this due to the fact that his research would have shown that your Movant could not be convicted of Count 1, a violation of 18 USC §922(g) or Count 2, a violation of 18 USC § 922(k). As for Count 3, there is such a convolution of statutes charged in this misdemeanor that a technical violation could have occurred. Your Movant' s main concerns are Count 1 and Count 2. One last example that supports Movant's ineffective assistance of counsel, a violation of the Sixth Amendment is that this was not the proper jurisdiction and venue for these charges. Mr. Cox, being trained in law either knew, should have known or through diligent research found out that the Assistant United States Attorney (AUSA) had no authority or jurisdiction to bring these charges against the Movant in violation of the Movant's due process rights. A quick look at the Parallel Table of Authorities and Rules will show that none of the charges filed have implementing authority as required by the Federal Register Act and therefore, they only apply to government agencies and government employees.

The fact that both Mr. Cox, Movant' s attorney and Mr. Schwartz, the AUSA have completed law school and practiced for a number of years, fuels the fact that both men had the proper training to know or through proper due diligent research (within their trained ability) should have found out the above facts. For these reasons, ineffective assistance of counsel, prosecutoral misconduct and violations of due process are all in violation of your Movant's Sixth Amendment rights under the Constitution of the United States. Movant prays that this Honorable Court will follow this Circuit's lead and liberally construe this pro se motion with no regard as to how inartfully it is submitted.

STATEMENT OF FACTS

Your Movant, Daniel Carlson, operated a tree service company of his own in the Louisville area. Mr. Carlson led a quite life making a good living for himself and not doing a lot of "hell raising" as is so common with this generation. He did however, have one huge fetish. He was a self acclaimed "gun nut." He collected every gun he could get his hands on. Your Movant NEVER sold any guns. He collected long guns, short guns, big guns, little guns, hand guns, etc. Movant stated the reason he acquired his gun dealer license was to enable him to "collect" guns. Reviewing the transcripts, your Movant finds that his initial offense level should have been a Six (6) instead of Twelve (12) due to the fact that his guns were a collection. This Honorable Court differentiated between an accumulation and a collection to leave your Movant's level at Twelve (12). In the conclusion we will address remedies, however this needed to be stated at the beginning.

Now let us go back to Count One (1). Count One (1) charges Movant with a violation of 18 USC § 922(j) which is a class C felony and states:

> "It shall be unlawful for any person to receive, conceal, store, barter, sell, or dispose of any stolen firearm or ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of which constitutes, or which has been shipped or transported in interstate or foreign commerce, knowing or having reasonable cause to believe the firearm or ammunition was stolen."

This was the law at the time of the alleged illegal purchases. As stated in *United States* v. *Andaverde,* 64 F.3d. 1305 (9th Cir. 1995), "Defendant was not guilty of possession of a stolen weapon under federal weapons statute, where there was no evidence that the stolen shotgun had traveled in interstate commerce after it was stolen." The Ninth Circuit deliberately decided this question as to the grammatical reading of the statute. Citing *United States* v

Honaker, 5 F.3d. 160 (6th Cir. 1993), the dissenting opinion of Circuit Judge David Nelson which quoted *United States* v *West,* 562 F.2d. 375 (6th Cir. 1977), saying "Our decision in *West, supra,* teaches that words have the former meaning; a firearm is not a stolen firearm unless it has been stolen by the time the interstate language comes into play."

Now back to this instant case. There has been no evidence submitted to this Court, nor can there be any evidence submitted to this Court which shows that your Movant knowingly received stolen firearms that have moved in interstate commerce. Additionally, there is no evidence that your Movant, at the time of purchase, knew or had reasonable cause to believe these firearms were stolen.

As for Count 2, which claims your Movant received in interstate commerce a firearm that has had the manufacturer's serial number obliterated, in violation of 18 USC § 922(k). Now let us look at this statute. It states:

> "It shall be unlawful for any person knowingly to transport, ship, or receive in interstate or foreign commerce, any firearm which has had the importers or manufacturer s serial number removed, obliterated or altered or to possess or receive any firearm which has had the importers or manufacturer's s serial number removed, obliterated or altered and has at any time been shipped or transported in interstate or foreign commerce."

Now let us dissect this statute as it applies to your Movant. As Mr. Cox and Mr. Schwartz knew or should have known of the scienter requirement of this statute that requires evidence beyond reasonable doubt and not just inferred evidence, that this Movant "knew" that the gun in question had the serial numbers altered or obliterated. As in *Staples* v. *United States,* 114 S.Ct. 1793, 128 L.Ed.2d. 608 (1944), your Movant contends that the burden is on the government to prove the scienter requirement that Movant "knew" that the serial numbers had been obliterated. Also in support of this is *United States* v.

Tomlinson, 67 F.3d. 508 (4th Cir. 1995) ". . . the mens rea presumption requires knowledge of the facts that make the defendants conduct illegal. . ." While this case is cited to support our stand on Count 2, it also holds true for Count 1 as well. As in *United States* v. *Fennell,* 53 F.3d. 1926 (D.C. Cir. 1995) states: ". . . we conclude that under 18 USC § 922(k) the government must establish that the defendant knew of the obliteration."

Also as stated in *United States* v. *Hooker,* 997 F. 2d. 67 (5th Cir. 1993) ". . . any ambiguity created by the language of 18 USC § 922(k) is cleared up by Section 924(a)(1)(B) which provides the penalty for violations of Section 922(k). Section 924(a)(1)(B) applies by it's terms only when the defendant 'knowingly violates's Section 922(k).

As to Count 3, violation of 18 USC § 922(m), which requires record keeping as to purchase and sale of firearms, your Movant was technically in violation as it pertains to properly maintain required record keeping pursuant to 18 USC 922(m). However, in searching the licensing statute, 18 USC § 923, one segment stood out. In 18 USC § 923(c) it is stated:

> "Nothing in this chapter shall be construed to prohibit a licensed manufacturer, importer or dealer from maintaining or disposing of a personal collection."

This keeps in mind the final part of our argument. As stated earlier, this Court assessed an offense level of twelve (12), pursuant to U.S.S.G. § 2K2.1(a)(7). This level was increased by Six (6) levels due to applying U.S.S.G. 2K2.1(b)(1)(F) which penalized the Movant extra for not viewing Movant's collection of guns a "collection." In support of our argument, we must look to the experts for the definition of both "collection" and "accumulation."

> *Webster's New World Dictionary, Third College Edition* defines:
>
> Accumulation as "an accumulation or being accumulated; collection; 2. Accumulated or collected material; heap 3. The addition to capital or addition to profits.

Balantine's Law Dictionary defines:

accumulation as "an increase by growth or addition.

Websters, supra, defines collection as:

"The act or process of collecting 2. things collected, specifically as in a hobby [a collection of stamps] 3. a mass or pile; accumulation 4. money collected as in church.

Ballantine's supra, defines collection as:

"a group of things assembled, as a collection of rocks.

Using definition from any source will show the same results. A collection is an accumulation and an accumulation is a collection. Under no circumstances could a rational trier of fact have concluded anything other than the fact that your Movant' s guns were a collection as defined by both *Websters* and *Balantines.*

Your Movant was also enhanced two levels due to firearm with obliterated serial number. It is obvious by the foregoing evidence that your Movant could not be found guilty of 18 USC § 922(k) from the previous arguments.

CONCLUSION

As stated in *United States* v. *Doe,* 860 F.2d. 488 (1st Cir. 1988), "The prosecutor does not represent an entity whose interests include winning at all costs; Prosecutor's client is society which seeks justice not victory." With this in mind we conclude our Motion. What are the merits of the government's case against your Movant? Your Movant was an admitted "gun nut" who *collected* all of the guns he could buy. Your Movant *never* sold any guns, only bought guns. He *collected* short guns, long guns, big guns, little guns, hand guns, etc. Your Movant was such a law abiding citizen that he took more guns to the ATF which they missed during the search. One of these guns is the gun that had the serial number obliterated. Now would a gun dealer, *if* he *knew,* take a gun with no serial number to the ATF? That should be hard for even an AUSA to believe! All allegations allude to the fact that because individuals over a 3 to 4 year period sold your Movant several guns a flag should have been raised as to the guns being stolen.

Most gun dealers have a far greater turn around than your Movant. The fact that your Movant did not destroy any of the guns, lends proof to the fact that he considered them a collection as should this Honorable Court so consider them. The mere fact that your Movant took the ATF agents to his shed and gave them those guns proves this Movant had nothing to hide.

In closing, for all of the reasons outlined above, your Movant prays this Honorable Court to set aside and vacate Count One (1) and Count Two (2) against your Movant. Movant concedes to Count Three (3) and prays this Honorable Court to resentence Movant on Count Three (3) using the appropriate U.S.S.G. guideline which results in an offense level requiring Zero (0) to Six (6) month range. Using the information contained herein and in the interest of true justice, Movant prays this Honorable Court will correct the past mistakes and grant this motion and set your Movant free.

Respectfully submitted,
/s/ Daniel Leon Carlson
Daniel Leon Carlson
Pro Se Movant

CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing 28 USC § 2255 Motion was placed in the United States Mail on this the 13 day of April, 1997, to Assistant United States Attorney, Duane Schwartz, Bank of Louisville Building, Tenth Floor, 510 West Broadway, Louisville, Kentucky 40202.

Respectfully submitted,
/s/ Daniel Leon Carlson
Daniel Leon Carlson
05720-033
Anteaus Unit
P. O. Box 14507
Lexington, Kentucky 40512-4507

Date this the 13 day of April, 1997.